Philip R. Higdon (Bar No. 003499)
Kirstin T. Eidenbach (Bar No. 027341)
Thomas D. Ryerson (Bar No. 028073)
PERKINS COIE LLP
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
Telephone: 602.351.8000
Facsimile: 602.648.7000
Email: PHigdon@perkinscoie.com
KEidenbach@perkinscoie.com
TRyerson@perkinscoie.com

Attorneys for Defendant Navajo Nation

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

THE HOPI TRIBE,

Plaintiff,

v.

NAVAJO NATION,

Defendant.

No. CV13-8172-PCT-GMS

NAVAJO NATION'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE HOPI TRIBE'S SECOND AND THIRD CLAIMS FOR RELIEF

and

RESPONSE TO THE HOPI TRIBE'S MOTION TO VACATE ARBITRATION DECISION

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Introduction

In 2006, the Hopi Tribe and Navajo Nation entered a historic Intergovernmental Compact to settle their decades-long litigation regarding each tribe's right to certain lands in northeastern Arizona. Among other things, the Compact granted members of each tribe certain specifically defined rights to enter the other tribe's land to conduct religious activities. Also, to avoid continuing litigation in federal court, the two tribes agreed to submit disputes arising under the Compact to a Joint Commission made up of two Navajos, two Hopis, and the Commission's neutral Chairman for binding arbitration.

In late 2012 and early 2013, an arbitration was held regarding whether the Compact granted Hopi religious practitioners an easement right to enter Indian allotments without the permission of the allotment holder or the holder's trustee, the United States government. Allotments are lands owned in fee by the federal government in trust on behalf of individual Indians; Indian tribes, such as the Navajo Nation, have no property rights in allotments. The arbitration ended when the Commission unanimously granted a motion to dismiss, ruling that it lacked jurisdiction to grant the Hopi Tribe's demand for the reasons set forth in that motion: namely, that (a) the Compact's terms did not grant the Hopi Tribe the right to enter allotments, and (b) the Commission could not adjudicate property rights in allotments owned in fee by the federal government for the benefit of individual Indians. Not satisfied with that result, the Hopi Tribe has filed the present Complaint challenging the Commission's decision and Motion to Vacate Arbitration Decision ("Motion to Vacate"). As shown below, both actions are meritless. This Court should reject the Hopi Tribe's attempt to re-open this dispute in this Court, and should also dismiss the Second and Third Claims for Relief in the Hopi Tribe's Complaint.

Factual Background

In 2006, the Navajo Nation and Hopi Tribe entered an Intergovernmental Compact (the "Compact"). [Exhibit[1] ("Ex.") 1] Among other things, it grants the Hopi Tribe a

[1] Citations to numbered exhibits refer to the exhibits attached to the Hopi Tribe's Motion to Vacate Arbitration Decision.

"permanent, irrevocable, pre-paid, non-exclusive easement, profit, license and permit to come upon the Navajo Lands" to collect and remove golden eagle chicks and hawks. [*Id.* § 2.4] "Navajo Lands" is defined in the Compact, in pertinent part, as "lands held in trust by the United States for the benefit of the Navajo Nation or the Navajo people as a whole." [*Id.* § 1.2] In contrast, allotments are held in trust by the federal government for the benefit of individual Indians and therefore fall outside this definition.

The Compact also creates a Commission to "decide and resolve" disputes that may arise between the Navajo Nation and Hopi Tribe under the Compact. [*Id.* §§ 8.1, 8.4] It further provides that the Commission is "the only forum for resolution of such disputes," unless it "fail[s] to make a decision." [*Id.* § 8.3] The Compact also provides that a Commission decision is subject to only limited review by the District Court—on specific grounds set forth in the Federal Arbitration Act ("FAA").[2] [*Id.* § 8.6; 9 U.S.C. § 1 *et seq.*]

In 2012, a dispute arose between the Navajo Nation and Hopi Tribe relative to eagle gathering: a Hopi religious practitioner had attempted to collect golden eagles not on "Navajo Lands," but instead on an allotment. When Navajo Nation law enforcement determined that the Hopi gatherer did not have permission from the federal government or the Indian allotment holder to gather on the allotment, it cited that individual for trespass.

In October 2012, the Hopi Tribe, pursuant to the Compact, filed a Demand for Arbitration (the "Demand") with the Commission to arbitrate whether the Compact granted the Hopi religious practitioners the right to go onto individual allotments and gather eagles there. [Ex. 2 at 2] The Hopi Tribe specifically demanded that the Commission declare that the Compact gave its members the right to enter lands "without regard to the land status of the underlying lands, including whether the lands have been 'allotted' to individual members of the Navajo Nation." [*Id.* at 7-8] It also sought

[2] As set forth more fully in the Navajo Nation's concurrently filed Motion to Dismiss the First Claim for Relief, the Navajo Nation waived sovereign immunity only for the limited purposes set forth in Article 8 of the Compact. [Ex. 1 § 8.9]

injunctive relief barring the Navajo Nation from "interfering with Hopi religious practitioners who access or gather eagles" on allotments. [*Id.* at 8]

In response, the Navajo Nation filed a Motion to Dismiss for Lack of Jurisdiction and Authority to Order Requested Relief (the "Motion to Dismiss") [Ex. 4], which set forth three grounds for dismissal of the Hopi Tribe's Demand:

- First, "[t]he language of the Compact itself does not grant or require access to allotted lands." [Ex. 4 at 2; *see also id.* at 5-6 (citing Ex. 1 § 2.4 (granting the Hopi Tribe an "easement, profit, license, and permit to come upon the *Navajo Lands*") (emphasis added) and Ex. 1 § 1.2 (defining "Navajo Lands" to include only "all lands held in trust by the United States for the benefit of the Navajo Nation or the Navajo people as a whole"))]
- Second, "[t]he requested relief implicates property and other legal rights held by persons and entities who are not parties to the Compact," namely, the federal government and the Indian allotment holders, "who have not subjected themselves to the jurisdiction of this Commission." [*Id* at 2; *see also id.* at 6-8]
- Third, "entities whose legal rights are implicated by the relief sought in the Hopi Demand," again, the federal government and the allotment holders, "are necessary and indispensable parties to any proceeding in which any such relief can be obtained but have not been and cannot be joined in this proceeding." [*Id.* at 2; *see also id.* at 8-12]

The Hopi Tribe responded by offering a different interpretation of the Compact and proffering parol evidence in support of that interpretation. [Ex. 11 at 7-12] Its response also attempted to show why, under federal law, the Navajo Nation could grant the relief the Hopi Tribe wanted [*Id.* at 15-19], and why the Commission could grant the Hopi Tribe's requested relief without joining the federal government or allotment holders. [*Id.* at 19-22]

Following a telephonic oral argument, the Commission's neutral Chairman, former Arizona Superior Court Judge Kenneth Fields, deferred ruling on the Motion to Dismiss until the full Commission—with its two Hopi and two Navajo members—was empaneled for the arbitration hearing. The parties later submitted pre-hearing briefs to the Commission, in which the Hopi Tribe summarized the parol evidence it planned to introduce at the hearing. [Ex. 10 at 9-23]

Before the evidentiary hearing began, the Commission heard the parties' arguments on the Navajo Nation's Motion to Dismiss. [Ex. 5 at 5] The Hopi Tribe again previewed for the Commission the evidence it was planning to present at the evidentiary hearing. [*Id.* at 26-27, 32-34, 41-42, 46] After hearing oral argument, the Commission deliberated and unanimously granted the Navajo Nation's Motion to Dismiss. [Ex. 6 at 82] The Hopi Tribe again proffered evidence—providing the Commission a witness list, an exhibit list, and volumes of transcripts from prior hearings—and moved for the Commission to reconsider its ruling. [*Id.* at 85-87; Ex. 7; Ex. 8] The Commission, again unanimously, declined to reconsider its ruling. [Ex. 6 at 91-92] Chairman Fields explained on the record that the Commission was granting the Motion to Dismiss "on the basis that was set forth in the Motion to Dismiss," specifically, that "[jurisdiction] is not given to us, and it can't be given to us in the agreement," and that "we don't have jurisdiction under Federal law." [*Id.* at 90] The Chairman also stated that the Commission made its decision as a matter of law, and accordingly did not make any factual determinations. [*Id.* at 92]

A written award followed. [Ex. 9] In pertinent part, the Commission wrote that "[a]ll Commissioners agree that [the Commission] lacks jurisdiction to consider the dispute involving allotted lands since it has no jurisdiction over the allotment holders and the U.S. Secretary of the Interior (the allotment trustee) under the Intergovernmental Compact." [*Id.* at 2]

Standard of Review

Under the Compact, a "Decision and Award of the Joint Commission . . . may be vacated or modified [by this Court] only on the grounds permitted under" the FAA. [Ex. 1 § 8.6] The grounds on which to vacate an arbitration award under the FAA are "limited" and are "designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures." *U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1167, 1173 (9th Cir. 2010) (citation omitted). Unless one of the grounds for vacating, modifying, or correcting an arbitration award under 9 U.S.C. §§ 10 and 11 can be shown, "a court *must confirm* an arbitration award." *Biller v. Toyota Motor Corp.*, 668

F.3d 655, 662 (9th Cir. 2012) (emphasis added); *accord Schoenduve Corp. v. Lucent Techs., Inc.*, 442 F.3d 727, 731 (9th Cir. 2006).

The Hopi Tribe relies on 9 U.S.C. § 10(a)(3), which requires a showing in pertinent part that "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy" and on 9 U.S.C. § 10(a)(4), which requires a showing that "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

A district court is required to give an extreme degree of deference to arbitrator's factual and legal determinations. For example, so long as an arbitrator's interpretation of a contract is "plausible," it must be upheld. *See Employers Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1485-86 (9th Cir. 1991) ("The [arbitration] panel's interpretation of a contract must be sustained if it is 'plausible.'"); *Van Waters & Rogers Inc. v. Int'l Bhd. of Teamsters, Local Union 70*, 913 F.2d 736, 739 (9th Cir. 1990) (similar). The same level of deference is given to an arbitrator's legal conclusions. Even if "the 'arbitrators' view of the law might be open to serious question, . . . [an award] which is one within the terms of the submission, will not be set aside by a court for error either in law or fact.'" *Employers Ins.*, 933 F.2d at 1485-86 (citation omitted).

Argument

The Hopi Tribe argues that the Commission's award should be vacated: (1) under 9 U.S.C. § 10(a)(3) because the Commission allegedly engaged in misconduct by failing to "hear evidence pertinent and material to the controversy" [Complaint, Second Claim for Relief] and (2) under 9 U.S.C. § 10(a)(4) because it purportedly "declin[ed] to enforce the Compact as between the parties." [*Id.*, Third Claim for Relief] As shown below, both grounds are baseless and do not justify vacating the Commission's arbitration award.

I. THE COMMISSION DID NOT REFUSE TO HEAR PERTINENT AND MATERIAL EVIDENCE, BUT INSTEAD MADE THE *LEGAL* DETERMINATION THAT IT COULD NOT GRANT THE RELIEF SOUGHT

The Hopi Tribe claims that this Court should vacate the Commission's arbitration award first because the Commission committed misconduct by failing to consider the Hopi Tribe's proffered evidence. [Motion to Vacate at 9-13; Compl. ¶¶ 84-86] What the Hopi Tribe ignores, however, is that the Commission made two **legal** rulings in granting the Navajo Nation's Motion to Dismiss, neither of which required the consideration of any evidence. As Chairman Fields stated, the Commission's decision was "a legal determination. We have not considered any facts. It's strictly on the law." [Ex. 6 at 92]

The Commission based its decision on the grounds "set forth in the Motion to Dismiss." [Ex. 6 at 90] That Motion raised two grounds that the Commission found were dispositive: First, the Compact's plain language did not extend to allotments. Chairman Fields: "[Jurisdiction] is not given to us, and it can't be given to us in the agreement." [*Id.*][3] Second, the Navajo Nation's Motion to Dismiss argued that federal law precluded the Hopi Tribe's Demand because the allotment holders and federal government were not before the Commission, and thus the Commission did not have jurisdiction to disturb their property rights or to grant the relief demanded by the Hopi Tribe against allotment holders and the federal government. Chairman Fields: "[W]e don't have jurisdiction under Federal law." [*Id.*] The Commission **did not need to consider any of the proferred evidence in reaching these legal conclusions**. Accordingly, the Hopi Tribe's argument

[3] The Hopi Tribe asserts (at 10) that the Commission's decision "was not an assessment of the merits of the Hopi Tribe's claims or a determination of the meaning of the disputed provision of the Compact." But that assertion is belied by the Chairman's statements. Additionally, the Hopi Tribe and Navajo Nation dedicated significant paper and oral argument to debating the meaning of the Compact. [Ex. 4 at 5-6; Ex. 11 at 5-12; Ex. 3 at 3-4; Ex. 10 at 7-9, 13-18; Ex. A attached to the Declaration of Kirstin T. Eidenbach in Support of this Motion and Memorandum (Navajo Nation's Pre-Hearing Brief) at 7-8, 22-23; Ex. 5 at 11-16, 24-33] The Hopi Tribe's claim that the Commission did not "determin[e] . . . the meaning of the disputed provision of the Compact" is misleading.

that this Court must vacate the arbitration award for the Commission's alleged misconduct in failing to consider evidence is a non-starter.

A. The Commission Rendered Its Decision By Making a Legal Determination of the Meaning of the Compact.

The first basis in the Navajo Nation's Motion to Dismiss was that the Compact, by its plain language, does not extend to allotments. The Commission could make this determination simply by reading the language of Section 2.4 of the Compact, together with the definition of "Navajo Lands" contained in Section 1.2 (which by definition excludes allotments). Because the Commission was able to interpret the Compact based on its plain language—and without considering the Hopi Tribe's irrelevant and unnecessary parol evidence—the Commission did not ignore any "material" or "pertinent" evidence in making this decision.

As noted above, the Commission's interpretation of the Compact must be given extraordinary deference by this Court, and must be upheld if "plausible." *See Employers Ins.*, 933 F.2d at 1485-86; *Van Waters & Rogers*, 913 F.2d at 739; *see also Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 798 (8th Cir. 2004). ("[A]n award must be confirmed even if a court is convinced the arbitrator committed a serious error."). Here, the Commission's interpretation of the Compact is not only *plausible*, but the only correct reading supported by the plain language of the Compact. The pertinent provision here, Section 2.4 of the Compact, reads in relevant part:

> The Navajo Nation grants to the Hopi Tribe, for the use and benefit of all current and future enrolled members of the Hopi Tribe, a permanent, irrevocable, prepaid, non-exclusive easement, profit, license, and permit to come upon the Navajo Lands, and to gather and remove fledgling Golden Eagles and hawks within the areas depicted on Exhibit B, and to gather and remove minerals and plant materials for religious and medicinal purposes from the Navajo Lands generally; provided, however, that such materials and things shall not be gathered for sale or other commercial purposes.

[Ex. 1 § 2.4] In interpreting this provision, it is important to recall the critical limitation imposed on Section 2.4 by the definition of "Navajo Lands" in Section 1.2, which by its

terms excludes allotments because an allotment is held in trust for individual Indians rather than the tribe as a whole.

In arguing that the Hopi can gather eagles outside of "Navajo Lands" (defined to exclude allotments), the Hopi Tribe argued to the Commission that Section 2.4 includes three distinct clauses, that "the term 'Navajo Lands' is included only in the first and third clauses of the sentence, not the second, which expressly gives Hopis the right to gather and remove eagles 'within the areas depicted on Exhibit B.'" [Ex. 10 at 13] Accordingly, by the lights of the Hopi Tribe, Section 2.4 contains three separate property rights in three separate clauses. Broken out, the Hopi Tribe's interpretation of Section 2.4 is as follows:

> The Navajo Nation grants to the Hopi Tribe, for the use and benefit of all current and future enrolled members of the Hopi Tribe, a permanent, irrevocable, prepaid, non-exclusive easement, profit, license, and permit:
> - to come upon the Navajo Lands, and
> - to gather and remove fledgling Golden Eagles and hawks within the areas depicted on Exhibit B, and
> - to gather and remove minerals and plant materials for religious and medicinal purposes from the Navajo Lands generally; provided, however, that such materials and things shall not be gathered for sale or other commercial purposes.

This interpretation produces several odd results that fatally undermine it. Under this reading, the first clause of Section 2.4 grants the Hopi Tribe a property right "to come upon the Navajo Lands," but that right is not associated with any purpose for that access. As the Compact's clear goal was to afford certain protections to Hopi religious practices, it defies logic that the Navajo Nation granted the Hopi Tribe an unqualified right to come upon the Navajo Lands for ***any*** purpose. *Malad, Inc. v. Miller*, 219 Ariz. 368, 371, 199 P.3d 623, 626 (Ct. App. 2008) (noting that courts must "consider the surrounding circumstances of the agreement" in interpreting the contract).[4] The other bizarre result of this interpretation is that the final sentence—prohibiting gathering "for sale or other commercial purposes"—would only apply to minerals and plant materials, but not to

[4] The Compact requires application of Arizona law in interpreting the Compact. [Ex. 1 § 13.1]

golden eagles. There is no reason why this prohibition would be limited just to minerals and plants, but impliedly permit the sale of fledging eagles. Under Arizona law, such a bizarre reading of the Compact should be, and was correctly, rejected. *Cnty. of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 599, 233 P.3d 1169, 1178 (Ct. App. 2010) (courts must "interpret the contract 'so as to make it effective and reasonable'") (citation omitted).

Before the Commission, the Navajo Nation contended instead that Section 2.4 grants the Hopi Tribe one property right—to go onto "Navajo Lands"—and that the following clauses specify the *purposes* for which that easement may be used:

> - to gather and remove fledgling Golden Eagles and hawks within the areas depicted on Exhibit B, and
> - to gather and remove minerals and plant materials for religious and medicinal purposes from the Navajo Lands generally;
>
> provided, however, that such materials and things shall not be gathered for sale or other commercial purposes.

This interpretation fixes the problems attendant to the Hopi Tribe's interpretation. It does not create a broad grant to "come upon the Navajo Lands" for no defined purpose, and applies the sale and commercial use prohibition equally to eagles and minerals and plant materials. Because this reading gives Section 2.4 a more reasonable meaning, it must be preferred.[5] *Cnty. of La Paz*, 224 Ariz. at 599, 233 P.3d at 1178.

In granting the Navajo Nation's Motion to Dismiss, the Commission determined that the Compact did not extend to allotments by way of the plain language of Section 2.4 and the use of its defined terms. [Ex. 6 at 90 (Chairman Fields: "[Jurisdiction] is not given to us, and it can't be given to us in the agreement.")] This interpretation is "plausible," and therefore must be confirmed. *See Employers Ins.*, 933 F.2d at 1485-86. Because the Commission made this *legal* determination, it did not need to consider evidence. The interpretation of clear contract terms "is a question of law for the court." *Hadley v. Sw. Props., Inc.*, 116 Ariz. 503, 506, 570 P.2d 190, 193 (1977); Restatement

[5] The Navajo Nation and Hopi Tribe presented these competing interpretations of Section 2.4 of the Compact as part of the oral argument on the Motion to Dismiss [Ex. 5 at 11-16, 20-21, 26-27] and in other briefing [Ex. 10 at 8, 13-18; Ex. A at 7-8].

(Second) of Contracts § 212 (1981) ("[A] question of interpretation of an integrated agreement is to be determined as a question of law."). And, because of the integration clause of the Compact [Ex. 1 § 15.1], the interpretation was properly made without considering any extrinsic evidence. Restatement (Second) of Contracts § 215 (1981) ("[W]here there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing.").

Despite these clear legal principles, the Hopi Tribe argues here that the Commission engaged in misconduct under 9 U.S.C. § 10(a)(3) in not considering the parol evidence the Hopi Tribe proffered in support of its contorted interpretation of the Compact. But under Arizona law, the Commission was entirely correct in rejecting that parole evidence because where, as here, "the terms of an agreement are clear and unambiguous, [courts] give effect to the agreement as written." *Town of Marana v. Pima Cnty.*, 230 Ariz. 142, 147, 281 P.3d 1010, 1015 (App. 2012). Likewise, parol evidence is only admissible "if [the court] finds that the contract language is reasonably susceptible to the interpretation asserted by its proponent." *Id.* (citation omitted). The Commission made no such finding. Additionally, "the judge need not waste much time if the asserted interpretation is unreasonable or the offered evidence is not persuasive." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 155, 854 P.2d 1134, 1141 (1993).

The Southern District of Florida addressed similar circumstances in *Spungin v. GenSpring Family Offices, LLC*, 883 F. Supp. 2d 1193 (S.D. Fla. 2012). There, petitioners filed a Demand for Arbitration. The respondent filed a Motion to Dismiss, claiming that the parties' agreement precluded petitioner's claims. The arbitrator granted the Motion to Dismiss before any discovery was exchanged. *Id.* at 1195. Petitioners moved to vacate the arbitration award, "contend[ing] that the [a]rbitrator erroneously dismissed their claim by not conducting an evidentiary hearing or affording Petitioners an opportunity to present evidence in the case" regarding the meaning of a release provision. *Id.* The District Court affirmed the arbitrator's award, reasoning that the arbitrator had no

reason to consider such evidence because the arbitrator did not find the provision to be ambiguous:

> [A] trial court should not admit parol evidence until it first determines that the terms of a contract are ambiguous. In the absence of an ambiguity on the face of a contract, it is well settled that the actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of that language controls. **Thus, it is apparent that the Arbitrator should not have considered parol evidence if he found that the release at issue was not ambiguous. Accordingly, I find that the Arbitrator was not guilty of misconduct in granting GenSpring's Motion to Dismiss without holding an evidentiary hearing**.

Id. at 1197-98 (emphasis added, internal quotations and citations omitted).

The Commission did not engage in misconduct under 9 U.S.C. § 10(a)(3) by granting the Motion to Dismiss prior to the evidentiary hearing. Quite the opposite: in the face of the unambiguous terms of the Compact, had the Commission here allowed parol evidence, it may have erred under the FAA. *See Excel Corp. v. United Food & Commercial Workers Int'l Union, Local 431*, 102 F.3d 1464, 1468 (8th Cir. 1996) ("When the language of the contract is clear and unambiguous, however, as in the present case, the arbitrator may not rely on parol evidence.").

Nor can the Hopi Tribe demonstrate that it was unfairly prejudiced by the Commission. "Vacatur is appropriate only when the exclusion of relevant evidence so affects the rights of a party that it may be said that he was deprived of a fair hearing." *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir. 1985) (internal quotations and citation omitted). Here, the Hopi Tribe was not "deprived of a fair hearing." The Navajo Nation filed its Motion to Dismiss, in which it offered its interpretation of the Compact, early in the arbitration proceeding. The Hopi Tribe then had numerous opportunities to proffer its parol evidence and explain its interpretation of the Compact. The Hopi Tribe:

- responded to the Motion to Dismiss, proffering parol evidence [Ex. 11 at 7-12];
- submitted a pre-hearing brief, proffering parol evidence [Ex. 10 at 9-23];

- engaged in oral argument regarding the Motion to Dismiss, proffering parol evidence [Ex. 5 at 26-27, 32, 41-42, 46]; and
- proffered its witness list [Ex. 7], exhibit list [Ex. 8], and hearing transcripts from a prior arbitration to the Commission [Ex. 6 at 85-87], moving for the Commission to reconsider its decision [*Id.* at 85].

In sum, the Hopi Tribe's claim (at 9) that "[t]he Commission heard no evidence relating to the parties' dispute about the meaning of the Compact" is simply not true. In fact, the only parol evidence that the Commission did not receive was a *live* presentation of evidence—evidence which the Hopi Tribe set forth in its briefing [Ex. 11 at 7-12], and in oral argument [Ex. 5 at 26-27, 32, 41-42; Ex. 6 at 85-87].

The Commission granted the Navajo Nation's Motion to Dismiss in light of the Compact's plain language. While the Hopi Tribe may disagree with the Commission's decision, it cannot be said to have been "deprived of a fair hearing." [6]

B. The Commission Additionally Decided That It Lacked the Authority to Grant Property Rights in Allotments to the Hopi Tribe.

The Commission similarly granted the Navajo Nation's Motion to Dismiss because under federal law the Navajo Nation would have no ability to convey to the Hopi Tribe a property right in an allotment. Federal law is clear that allotments are held in trust by the

[6] The cases cited by the Hopi Tribe are not to the contrary. In *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901*, the arbitration panel declined to give weight to testimony that "was unquestionably relevant to a determination of whether Otero actually engaged in immoral conduct in violation of the Company's disciplinary regulations." 763 F.2d 34, 40 (1st Cir. 1985). In *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 17 (2d Cir. 1997), the arbitration panel, in hearing an arbitration demand for fraudulent inducement, denied consideration of "crucial testimony concerning the negotiations and dealings between the parties about which it claims only [the witness] could testify." Accordingly, neither case addressed the situation faced by the Commission—the interpretation of the plain language of a contract.

In fact, *Tempo Shain* supports the Commission's decision here. There, the respondents claimed in part that the rejected testimony regarding fraud could not be introduced because of the parol evidence rule. In rejecting that argument, the court wrote that generally "a merger clause provision [like Section 15.1 of the Compact] indicates that the subject agreement is completely integrated, and **parol evidence is precluded from altering or interpreting the agreement**." *Id.* at 21 (emphasis added). In *Tempo Shain*, the Court ultimately concluded that "the parol evidence rule does not exclude evidence to show misrepresentation." *Id.* Here, no claims of fraud or misrepresentation are alleged by the Hopi Tribe. In the absence of such an exception here, *Tempo Shain* supports the application of the parol evidence rule to the present facts.

federal government for individual Indians and ***not*** Indian tribes. *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 651 n.1 (1976) (noting that allotments "end tribal land ownership and . . . substitute private ownership"); *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968) (finding that "the allotment system created interests in both the Indian and the United States"). Additionally, an allotment owner's property rights are fiercely protected under federal law. 25 U.S.C. § 348 makes explicit that the federal interest in allotments cannot be diminished via a conveyance of those interests. Any attempt to violate this policy is a criminal offense. 25 U.S.C. § 202.

That policy is only overcome by narrow and specific exceptions, also specifically enumerated in federal law. *Houle v. Cent. Power Elec. Coop.*, No. 4:09-cv-021, 2011 WL 1464918, at *5 (D.N.D. filed Mar. 24, 2011) (Mag. Report and Recommendation) ("Essentially, the only exceptions to the anti-alienation provisions of 25 U.S.C. § 348, which are absolute on their face, are the specific conveyances and contracts that Congress has authorized in other federal statutes."), *adopted in its entirety*, Order Adopting Report and Recommendation 2, Apr. 11, 2011, ECF No. 116. These exceptions generally pertain to rights-of-way for railroads, oil and gas pipelines, telephone and telegraph lines and other communications facilities, power projects, and public highways. *See, e.g.*, 5 C.F.R. Part 169. But even there, the Bureau of Indian Affairs' regulations explicitly provide that the consent of the *landowner and the United States* is required before such a right-of-way may be granted:

> Except as provided in paragraph (c) of this section [listing situations not applicable here], **no right-of-way shall be granted over and across any individually owned lands, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the owner or owners of such lands** and the approval of the Secretary.

25 C.F.R. § 169.3(b) (emphasis added). The Hopi Tribe also cannot demonstrate that a tribe (such as the Navajo Nation) can provide the statutorily-required consent on behalf of the individual allotment holder or the federal government. *See Houle*, 2011 WL 1464918, at *17 ("Indian tribes do not have the legislative or adjudicatory power to regulate the

amount that allottees can receive for rights-of-way across their allotments, much less give consent to the grants of rights-of-way on their behalf.") (citing 25 U.S.C. §§ 323-325).[7]

The Navajo Nation's Motion to Dismiss correctly posited that such a dispute over property rights in an allotment was properly heard only in federal court, and only with the appropriate parties—the allotment holder and the federal government as his or her trustee. [Ex. 4 at 6-7]

The Hopi Tribe, of course, disputes this reading of the law. At this stage of the proceedings, however, it does not matter. The Commission, taking into account the limits of federal law, determined that what the Hopi Tribe asked of it—to grant a property right over allotments to the Hopi Tribe—was impossible under its reading of federal law, and accordingly dismissed the Hopi Tribe's demand.[8] This Court is required to give the Commission's legal determinations a high degree of deference. *Employers Ins.*, 933 F.2d at 1485-86 ("The rule is, though the 'arbitrators' view of the law might be open to serious question, . . . [an award] which is one within the terms of the submission, will not be set aside by a court for error either in law or fact.'") (citation omitted).

Once the arbitration panel decided that federal law prohibited it from granting the Hopi Tribe's requested relief, the Hopi Tribe's parol evidence regarding the meaning of the Compact again became irrelevant. Facing similar circumstances, the Eighth Circuit

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[7] Clearly, what the Hopi Tribe sought in the arbitration was a property right in allotted lands. The Hopi Tribe sought to enforce on allotments the "permanent, irrevocable, prepaid, non-exclusive easement, profit, license and permit" granted by Section 2.4 of the Compact.

[8] Another related ground presented to the Commission for dismissing the Demand was that the Demand sought relief implicating the property right of allotment holders and the federal government, who were not parties to the arbitration. [Ex. 4 at 8-12] Accordingly, the Commission could not grant the Hopi Tribe a property right in allotments. *Nicodemus v. Wash. Water Power Co.*, 264 F.2d 614, 615 (9th Cir. 1959) ("The United States is an indispensable party to a suit to establish or acquire an interest in allotted Indian land held under a trust patent."); *see also Minnesota v. United States*, 305 U.S. 382, 386 n.1 (1939) ("In the case of patents in fee with restraints on alienation it is established that an alienation of the Indian's interest in the lands by judicial decision in a suit to which the United States is not a party **has no binding effect** but that the United States may sue to cancel the judgment and set aside the conveyance made pursuant thereto.") (emphasis added). That same problem infects the First Claim in the Hopi Tribe's Complaint.

Court of Appeals affirmed an arbitration award where that arbitration panel granted the defendant's motion to dismiss for res judicata. *Hudson v. ConAgra Poultry Co.*, 484 F.3d 496 (8th Cir. 2007). The Court wrote there that where a legal determination was made that caused the arbitration panel to dismiss the demand, no evidence needed to be considered: "It is true that the arbitrators did not hear evidence relating to the substance of the Hudsons' tort claims, but it would make little sense for the arbitration panel to hear such evidence if it had already determined that such claims were barred by res judicata." *Id.* at 503-04. Similarly, here, paraphrasing *Hudson*, the Navajo Nation filed a Motion to Dismiss reciting pertinent federal law, and "[t]here is no evidence that the [Commission] failed to consider the arguments [regarding pertinent federal law] presented by each party." *Id.* at 504; *see also* authorities cited in [Ex. 4 at 6-12; Ex. 11 at 15-22; Ex. 3 at 5-13. Due to the Commission's decision that federal law prohibited the relief sought by the Hopi Tribe, "it would make little sense for the [Commission] to hear . . . [the Hopi Tribe's] evidence if it had already determined that such claims were barred." *Hudson*, 484 F.3d at 504. Because the Commission did not commit misconduct by failing to consider any "pertinent" or "material" evidence, 9 U.S.C. § 10(a)(3), this Court cannot vacate the Commission's award on that purported ground.

II. THE COMMISSION DID NOT EXCEED ITS POWERS BY FAILING TO HEAR THIS DISPUTE; IT HEARD AND DECIDED THE DISPUTE

The Hopi Tribe also claims that the Commission violated 9 U.S.C. § 10(a)(4) by "imperfectly execut[ing]" its powers. "Arbitrators have 'exceeded their powers' only when their award is "completely irrational, or exhibits a manifest disregard for the law." *Kaliroy Produce Co. v. Pac. Tomato Growers, Inc.*, 730 F. Supp. 2d 1036, 1041 (D. Ariz. 2010) (citations omitted). The gravamen of the Hopi Tribe's claim here is that the Commission *failed* to resolve the Hopi Tribe's Demand for Arbitration. [Motion to Vacate at 14; Compl. ¶ 91] But the facts belie that characterization of the proceedings. The Commission acted in accordance with its obligations under Section 8.4 of the Compact to "decide and resolve the dispute."

Here, the Commission decided the dispute—by granting the Motion to Dismiss, it interpreted the Compact and the law applicable to the Hopi Tribe's Demand. While the Hopi Tribe may disagree with the Commission's conclusion, it surely cannot deny that, by granting the Navajo Nation's Motion to Dismiss, the Commission made a "decision" by dismissing the dispute. *See Spungin*, 883 F. Supp. 2d at 1197-98 (confirming arbitration award in which the arbitrator granted a motion to dismiss based on the plain language of the parties' agreement). Moreover, by making this decision, the Commission "resolved" the dispute. The Commission made clear that if the Hopi Tribe wanted to gather eagles on allotments, it needed to seek that relief from the allotment owners and the federal government—but not the Navajo Nation. Accordingly, the Commission did not fail to meet its obligations.[9]

Conclusion

The Commission's arbitration award was legal, valid, and enforceable under the Federal Arbitration Act. This Court should therefore deny the Hopi Tribe's Motion to Vacate Arbitration Decision and dismiss the Second and Third Claims for Relief of the Hopi Tribe's complaint.

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[9] The Hopi Tribe dedicates significant space in its Motion to Vacate (at 14-16) toward showing that the Commission could have made a decision that did not bind the allotment holders and the United States. But those arguments are immaterial. The relief that the Hopi Tribe sought from the Commission *clearly* impacted the property rights of allotment owners:

> The Hopi Tribe seeks a declaratory judgment and an order of specific performance that (1) members of the Hopi Tribe can access and collect golden eagles and hawks from all areas depicted on Exhibit B in accordance with the terms of the Compact, without regard to the land status of the underlying lands, including whether the lands have been "allotted" to individual members of the Navajo Nation.

[Ex. 2 at 7-8] The Hopi Tribe has cited no authority supporting its argument that a Commission order giving the Hopi Tribe easement rights to an allotment is anything less than a grant of a property right in an allotment. Moreover, the Hopi Tribe cannot circumvent calling this a property right simply by asking the Commission to order the Navajo Nation to stop enforcing trespass law. Instituting some kind of lawless frontier, wherein Navajo allottees could no longer call on law enforcement if they encountered a trespasser, would certainly work against the Compact's goal of "harmony and . . . mutual respect." [Ex. 1 Preamble]

Dated: July 19, 2013

PERKINS COIE LLP

By: s/ Philip R. Higdon
Philip R. Higdon
Kirstin T. Eidenbach
Thomas D. Ryerson
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788

Attorneys for Defendant Navajo Nation

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2013, I electronically transmitted the attached document to the Clerk of the Court using the CM/ECF system for filing and transmittal of a notice of electronic filing to the following CM/ECF registrants:

Timothy R. Macdonald
ARNOLD & PORTER LLP
370 Seventeenth Street, Suite 4500
Denver, Colorado 80202-1370
Attorneys for the Hopi Tribe

I hereby certify that on July 19, 2013, I served the attached document by first class mail on the Honorable G. Murray Snow, United States District Court, Sandra Day O'Connor U.S. Courthouse, Suite 620, 401 West Washington Street, SPC 80, Phoenix, Arizona 85003.

s/ Susana M. Frietz